




1932

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Recommended Citation

Carnahan, Wendell (1932) "The Kentucky Rule of Damages for Breach of Executory Contracts to Convey Realty," *Kentucky Law Journal*: Vol. 20 : Iss. 3 , Article 4.
Available at: <https://uknowledge.uky.edu/klj/vol20/iss3/4>

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THE KENTUCKY RULE OF DAMAGES FOR BREACH OF EXECUTORY CONTRACTS TO CONVEY REALTY.

As a general proposition, the fundamental principle of the law of damages is to compensate an injured party for loss sustained, whether *by breach of contract* or by tort; and it must be conceded that there is a breach of contract in any case wherein a vendor refuses or is unable to convey a title to realty in accordance with the terms of an executory agreement under circumstances in which the vendee is ready, willing and able to perform his correlative obligations. However, a number of jurisdictions, among them Kentucky, have made an exception *in certain instances* to this principle of damages when applied to actions for breach of contracts for the sale of land, both executory, on suit for breach of the agreement to convey, and executed, on suit for breach of warranties of title. It is with the former that this article deals.

This exception is commonly referred to as the "English Rule" and, when applied, the effect is to limit recoverable damages to the amount paid on the purchase price and expenditures by the vendee in reliance upon expected performance of the executory contract by the vendor, or, in the absence of such payments, to nominal damages; whereas, in cases or jurisdictions in which the exception is not applied, the measure of such damages is the amount of payments and expenditures *plus* the difference between the contract price and the market value of the land at the time of the breach, which is usually the time when title was to have been conveyed as provided in the agreement.

The basis of the exception seems to lie in a distinction between and classification of the causes of the breaches:

- I. A refusal by a vendor, holding good title, to convey;
- II. Fraud on the part of the vendor in falsely representing himself as holding good title;
- III. Total lack of title in the vendor at the time of the agreements;
- IV. A defect not amounting to a total lack of title in the vendor, either unknown to him, or of such a nature that he honestly believed that he could remove it before time for performance.

I. A refusal by a vendor, holding good title, to convey, or a voluntary incapacitation subsequent to formation of the agree-

ment, as by conveyance to a third party, has properly and uniformly been held not to justify an exception to the general rule of compensatory damages for breach of the contract to convey. In such case, the measure of damages is the difference between the contract price of the land and the fair market value thereof at the time of the breach, plus recovery of payments or expenditures, with interest, made by the vendee in reliance upon the anticipated performance of the vendor.¹

In *Gordon v. Wanless*,² which was a suit for damages for breach of contract to exchange lands, the defendant having conveyed to another, the court stated:

"The rule is well settled that, where a vendor refuses to convey property which he has agreed to sell, the vendee is entitled to recover the difference, if any, between the price fixed by the contract and the fair market price of the property at the time the contract was broken, and in addition his reasonable costs and expenses in an effort to complete the sale."

II. Fraud on the part of the vendor in falsely representing to the vendee at the time of formation of the contract that the vendor holds good title should be the basis of full recovery of the difference between the contract price and market value of the land at the time of breach, plus payments and expenditures, with interest, and the law should not invoke an exception to the rule of compensatory damages in favor of a fraudulent vendor. The Kentucky Court has correctly recognized the applicability of the general proposition and refused to limit the general rule of compensatory damages by the exception above stated.³

It must be recognized, however, that difficulty lies in attempting to lay down categorically just what factors will con-

¹ *Patrick v. Marshall* (1810), 2 Bibb. (5 Ky.) 40, 4 Am. Dec. 670; *Fisher's Heirs v. Kay* (1811), 2 Bibb. (5 Ky.) 434; *Kaelin v. Rufenacht* (1885), 6 Ky. Law Rep. 748 (Abst. Dec.); *Caumisar v. Conley* (1901), 22 Ky. Law Rep. 1237, 60 S. W. 375; *Whitworth v. Pool* (1906), 29 Ky. Law Rep. 1104, 96 S. W. 880.

² (1929) 231 Ky. 498, at 501; 21 S. W. (2nd) 815.

³ *Gerault v. Anderson* (1812), 2 Bibb. (5 Ky.) 543; *Rutledge v. Lawrence* (1818), 1 A. K. Marsh. (3 Ky.) 396. In *Goff v. Hawks* (1831), 5 J. J. Marsh. (28 Ky.) 341, the court stated: "If, however, the covenantor has been guilty of fraud, a different rule may govern the case. Then, he would be responsible for the increased value of the land, at the time his covenant should have been performed." This language was quoted with approval in *Potts v. Moran's Exec'rs* (1930), 236 Ky. 28, 32 S. W. (2nd) 534; *Wilson v. Hendrix* (1891), 13 Ky. Law Rep. 687 (Abst. Dec.); *Salyer v. Blessing* (1913), 151 Ky. 459, 152 S. W. 275; *Elsey v. Lamkin* (1914), 156 Ky. 836, 162 S. W. 106; *Bunch v. Bertram* (1927), 219 Ky. 848, 294 S. W. 805.

stitute fraud in varying circumstances. Diversity exists in various jurisdictions in holding that certain factors constitute fraud *as a matter of law*; and, of course, juries will differ in their reactions to evidenciary showings of fraud *as a matter of fact*. The Kentucky Court is very liberal in favor of the vendor in refusing to treat proof of the existence of an outstanding defect of title, known to the vendor and unknown to the vendee, as fraudulent *per se*, and apparently limits application of the fraud rule to cases in which fraud is found on a factual issue.⁴

III. Total lack of title in the vendor at the time of the formation of the agreement, with continued inability to perform at time for execution of the contract, may or may not amount to a defense. Under those jurisdictions⁵ refusing to follow the "English rule," of course lack of title is no defense. Under those jurisdictions applying the "English rule," total lack of title, if the vendor knew or should have known thereof, is usually taken as the equivalent of fraud, and therefore no excuse for nonperformance.⁶

The case of *Jenkins v. Hamilton*,⁷ (which was overruled on the angle of damages,⁸) was a suit for specific performance with a claim for damages for deficiency; the opinion contains this very pertinent language:

"Jenkins positively covenanted to convey to them within thirty days the fee simple title to the 153-acre tract free from all liens and encumbrances or claims and he must be held bound by such undertaking, even though Hamilton and Elliott at the time knew of all the facts, and were of the opinion that he could not carry out that contract. It would not be a safe rule to permit one to evade the effect of his failure to carry out his contract by saying that the other party knew at the time it was entered into that it could not be carried out. To hold so would be to point out a plain avenue of escape in many cases from one's solemn obligations.

". . . In other words men must be bound by their contracts, and if they make contracts which it turns out they could not perform, they must from the very nature of things be liable therefor."⁹

⁴ E. g., compare cases cited *post*, note 89, where several states have held that the existence of an inchoate right of dower, undisclosed to the vendee, forms the basis for recovery of compensatory damages, apparently as being equivalent to fraud, while the Kentucky court has held *contra* in *Potts v. Moran's Exec'r* (1930), 236 Ky. 28, 32 S. W. (2nd) 534.

⁵ See cases cited *post*, notes 106-124 inclusive.

⁶ *Stephenson v. Harrison* (1823), 3 Litt. (13 Ky.) 171.

⁷ (1913) 153 Ky. 163, at 168, 154 S. W. 937.

⁸ *Grenshaw v. Williams* (1921), 191 Ky. 559, 231 S. W. 45, 48 A. L. R. 5.

⁹ As to damages, the court stated: "The court properly instructed

Later referring to this case, the Court stated¹⁰ that in the Jenkins case the defendant "did not pretend to have any title or interest whatever in the premises he contracted to convey."

But in *Potts v. Moran's Exec'rs*,¹¹ is found this dictum:

"We have never held that, if the vendor at the time of entering into the contract knows that he has not title, or that it is necessary to procure the consent or conveyance of another whom he is without power to compel, this of itself in case of breach is such bad faith as will entitle the vendee to the benefit of his bargain. . . ."

IV. A defect, not amounting to a total lack of title in the vendor, either unknown to him, or of such a nature that he honestly believed that he could remove it before time for performance is the situation in which the exception is most commonly applied, and the case of *Potts v. Moran's Exec'rs*^{11*} is the most recent case extending this doctrine in Kentucky. In that case the suit was for breach of contract to deliver title to lands situated in Florida, with a difference between contract and market values of \$36,295.00, the defect in title being an inchoate right of dower which the vendor's wife (not a party to the agreement), refused to release; it did not appear in evidence that the vendor had acted in bad faith. The trial court directed a verdict of one dollar, and the ruling was affirmed by the Court of Appeals in a decision in which the Court, after reviewing a number of English and American authorities, followed the "English rule."

The Court in *Crenshaw v. Williams*¹² had entered a similar judgment where the defect consisted of a life estate in the vendor under circumstances in which the vendor had honestly supposed that he held a fee simple title.

While this exception to the general rule of damages is clearly recognized, the reasons for the rule, while admittedly based upon a line of English decisions, are conflicting and obscure both in Kentucky and elsewhere, and a further consideration of the law in Kentucky first requires an examination of the English cases.

the jury that the measure of damages was the difference between the contract price and the fair and reasonable market value of the land on the day it was to have been conveyed under the contract, if the value was in excess of the contract price. . . ."

¹⁰*Crenshaw v. Williams*, *supra*, note 8.

¹¹(1930) 236 Ky. 28, 32 S. W. (2nd) 534.

^{11*}*Supra*, note 11.

¹²*Supra*, note 8.

The earliest case in which the doctrine was enunciated was *Flureau v. Thornhill*,¹³ which was a suit for breach of the executory contract, the vendor being without fraud. De Grey, C. J., stated:

"Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost."

And Blackstone, J., added:

"These contracts are merely upon condition, frequently expressed but always implied, that the vendor has a good title. If he has not, the return of the deposit with interest and costs is all that can be expected."

No further reason was given, and the decision was without citation of authority upon this proposition.

Almost immediately dissatisfaction was felt toward this rule. Between 1776 and 1826 two unreported cases¹⁴ refused to follow the decision. The next case, *Hopkins v. Grazebrook*,¹⁵ was decided in 1826. There the defendant had contracted with a third party for the purchase of an estate, but, without waiting for a conveyance, had put up the estate for sale in lots by auction and had contracted with the plaintiff to make good title by a certain date, which he was unable to do, as defendant's vendor never made conveyance to him. The Court allowed full recovery, upon the ground that where a vendor holds out an estate as his own, the purchaser may presume that he had a satisfactory title.¹⁶

This limitation was thereafter considered as well established

¹³ (1776) 96 Eng. Rep. 635, 2 W. Bl. 1078.

¹⁴ *Jones v. Dyke*, Sugden: Vend. & Pur. (14 ed.) append. 5; the decision was by the court of Common Pleas in banc. *Bratt v. Ellis*, Sugden: Vend. & Pur. (14 ed.) append. 6; the decision was at nisi prius.

¹⁵ 108 Eng. Rep. 364, 6 Barn. & C. 31, 9 D. & R. 26, 13 E. C. L. 100, 5 L. J. K. B. (O. S.) 65

¹⁶ Abbott, J., stated: "Upon the present occasion I will only say that if it is advanced as a general proposition, that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it." Bayley, J., added: "The case of *Flureau v. Thornhill* is very different from this, for here the vendor had nothing but an equitable title. Now where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title, and if he holds out as his own, that which is not so, I think he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted."

and was frequently invoked to avoid the rule of *Flureau v. Thornhill*¹⁷ up until 1874 when the limitation was overturned in the House of Lords.¹⁸

There was thus established the general rule of *Flureau v. Thornhill*¹⁹ and the exception engrafted thereon by *Hopkins v. Grazebrook*,²⁰ and from 1826 to 1874 the problem seemed largely to be whether the Courts, which felt antagonistic to the former rule, could justifiably bring an instant case within the limitation of the latter. The reasoning was at times ingenious; and the cases were about equally divided.²¹

¹⁷ *Supra*, note 13.

¹⁸ *Bain v. Fothergill* (1874), L. R. 7 H. L. 158, L. R. 7 Eng. & Ir. App. 158, 43 L. J. Ex. 243, 31 L. T. 387, 23 W. R. 261.

¹⁹ *Supra*, note 13.

²⁰ *Supra*, note 15.

²¹ *Walker v. Moore* (1829), 109 Eng. Rep. 504, 10 B. & C. 416, 8 L. J. (O. S.) K. B. 159, followed *Flureau v. Thornhill*. Plaintiff contracted with defendant in good faith, and delivered an abstract showing good title; but before plaintiff examined it with the original deeds, the latter contracted to resell at a profit. Later examination showed an outstanding right to an undivided 1/20. Held, that plaintiff could not recover loss of profits. Park, J.: "A jury ought not, in case of a vendor in possession, to give any other damages in consequence of a defect than those which were allowed in *Flureau v. Thornhill*. . . . In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

Robinson v. Harmon (1848), 1 Exch. 850, 154 Eng. Repr. 363, 18 L. J. (Ex.) 202, discussed but did not apply *Flureau v. Thornhill*.

Worthington v. Worthington (1849), 137 Eng. Rep. 459, 8 C. B. 134, 18 L. J. C. P. 350, followed *Flureau v. Thornhill*. Plaintiff entered into possession under an agreement with defendant, whereby plaintiff was to hold as tenant for two years with liberty to make at his own expense alterations and additions to the premises, the plaintiff to have an option to purchase at any time within two years, it being provided in the agreement that defendant was possessed of the premises for his own life and the life of a third party and the survivor of them. Defendant did not have the interest stated. Held, that plaintiff was entitled to recover only the value of the proposed lease and not the value of the improvements he had made upon the lands. Coltman, J.: "Every one who purchases land knows that difficulties may exist as to the making a title, which are not anticipated at the time of entering into the contract. But, if the purchaser thinks proper to enter into possession and to incur expense in alterations, before the title is ascertained, he does so at his own risk."

Pounsett v. Fuller (1856), 139 Eng. Rep. 1235, 17 C. B. 660, 25 L. J. C. P. 145, 4 W. R. 323, followed *Flureau v. Thornhill*. Defendant had agreed to sell to plaintiff the shooting over the manor of a third party. It was afterwards discovered that defendant had a mere equitable title and, the third party refusing to confirm it, plaintiff sued defendant for breach of the contract. Held, plaintiff was entitled to recover nominal damages and expenses incurred in examination of the title. Williams, J., in referring to *Flureau v. Thornhill*, stated: "Thus

far the vendor was held liable to nominal damages only for his failure to make out a good title, unless he was guilty of fraud in the transaction. It is difficult to state the reason for the distinction. The position of a vendor of real estate is somewhat hard. His title is submitted to the scrutiny of a skillful conveyancer well practiced in the discovery of latent defects. One would think it quite punishment enough for him to be made to pay the expense of the detection of the fraud, without further infliction in the shape of damages for the fancied goodness of the bargain." (However, the learned judge here seems to overlook the fact that the principle of damages is not *punishment* to the defendant, but *compensation* to the plaintiff.)

Sikes v. Wild (1861), 121 Eng. Rep. 832, 1 B. & S. 587, 101 E. C. L. 587, 7 Jur. (N. S.) 1280; aff'd (1863), 122 Eng. Rep. 517, 4 B. & S. 421, 32 L. J. (Q. B.) 375, 8 L. T. R. (N. S.) 642, 11 W. R. 954, was this case: Real estate has been devised to the defendant in trust for sale, and plaintiff agreed to buy it. The defendant was aware that he could not make a title free from encumbrance, as by a marriage settlement the land was vested in trustees to secure an annuity to the widow of the devisor, but defendant had obtained from her a parol promise that, in the event of a sale, she would transfer her security to another property. Later she refused and the sale to plaintiff failed. Blackburn, J., held that the rule of *Flureau v. Thornhill* applied, and that loss of the bargain was not recoverable, but Cockburn, C. J., expressed strong dissent: "That immunity is in itself an anomaly. It probably had its origin in the difficulty in which, in the complicated and highly artificial state of our law relating to real property, an owner of real estate having contracted to sell is too frequently placed from not being able to make out a title such as a purchaser would be bound or willing to take. The hardship which would be imposed on a bona fide vendor if, upon some flaw appearing in his title, he were held liable in all the consequences which would attach upon a breach of contract relating to personality, and the difficulty which might be thrown in the way of bringing real property into the market if the full liability attached in such a case, have probably, by an understanding and usage among those engaged in the transfers of estates, led to this exception to the general law. But I can see no reason, in the absence of authority, for extending the exception to parties who, knowing that they have not any present estate to convey, take upon themselves to sell in the speculative belief that they will be able to procure an interest and title before they are called upon to execute the conveyance. There is an obvious difference between an owner who knows that he alone is entitled to an estate and has a right to sell it, although he may fail to make out a sufficient title, and a person who, not having the estate, takes upon him to sell on the expectation of acquiring the estate in time and making out a title."

In *Locke v. Furze* (1866), L. R. 1 C. P. 441, 1 H. & R. 379, 35 L. J. C. P. 141, 15 L. T. 161, 14 W. R. 403, a testator professed to grant to plaintiff a lease for 21 years with a covenant for quiet enjoyment. It turned out that the lessor had no title to grant for 21 years, having only an estate for life. He died and his successor avoided the lease and made a new bargain with the lessee for a shorter lease upon higher terms. Held, plaintiff could recover against the estate for the loss on difference in market values, distinguishing *Flureau v. Thornhill*.

Flureau v. Thornhill was adhered to in *Gray v. Fowler* (1873), L. R. 8 Ex. 249, 42 L. J. Ex. 161, 29 L. T. 297, 21 W. R. 916 and distinguished in *Wall v. City of London Real Property Co.* (1874), L. R. 9 Q. B. 249, 43 L. J. Q. B. 75, 30 L. T. 53. See also *Engel v. Fitch* (1868), *post*, note 22.

In *Engel v. Fitch*²² this situation was involved. The defendants, who were mortgagees of a house, sold it by auction to the plaintiff, possession to be given on completion of the purchase. The plaintiff resold at an advance. On investigation title was found satisfactory, but the plaintiff required possession at once, and the mortgagor was still in possession, refusing to vacate; the defendants were in a good position to oust him by ejectment, but they refused to complete the sale on the ground of expenses. Plaintiff sued for compensatory damages. The Court held that as the breach arose, not from inability of the defendants to make good title, but, from their refusal to take the necessary steps to give plaintiff possession according to the contract, plaintiff could also recover damages for loss of his bargain, and the measure of damages was the profit which it was shown he could have made on resale. In discussing *Flureau v. Thornhill*,²³ Cockburn, C. J., stated:²⁴

"It certainly would have been more satisfactory if, in a case laying down so important and at the same time exceptional a rule, the judges had given the reasons of their decision as a guide in future cases. We are left in doubt whether the decision proceeded on an established practice of conveyancers and solicitors, or, as has been suggested, on the ground that in the complicated state of the law of real property the owner of an estate is often unable to make out such a title as a purchaser will be bound to take, and the parties therefore, are not only placed on fair terms if, on the purchaser rejecting the title, the liability of the seller shall be limited to the repayment of the deposit and the expenses of investigating the title.

". . . But the limit of the exception is to be found in the reason on which it is based; the reason ceasing, the rule should also cease. It can properly have no application where the non-performance of the contract arises not from a difficulty as to title, but from the fact of the party who engages to sell not having first secured for himself the property in the thing of which he takes on himself to dispose. In such a case, there seems no sound reason why the consequences which arise on a breach of contract in the sale of goods should not equally attach. Far from seeing any grounds, either in law or reason, for extending the rule, there appear to us good grounds to the contrary in our view, notwithstanding what is said by Erle, C. J., in *Sikes v. Wild*, the rule is an anomalous one—that is to say, it is a departure from general principles, and inconsistent with ordinary rules of law, based upon and applicable to a special and exceptional state of things alone. There is, therefore no reason, in a legal point, for extending it; while, on the other hand, there seems good reason for not encouraging men to affect to sell property, the power to dispose of which they have not secured, and thereby entail inconvenience and possible loss on the purchasers without, at least, bringing to the knowledge of the latter the real position in which they stand."

²² (1868) L. R. 3 Q. B. Cas. 314; aff'd, L. R. 4 Q. B. Cas. 659, 38 L. J. Q. B. 304

²³ *Supra*, note 13.

²⁴ L. R. 3, Q. B. Cas. at pp. 326 and 331.

The Kentucky Court apparently treats this case as having been overruled,²⁵ but this seems erroneous.²⁶

In 1870 *Bain v. Fothergill* was decided in the Exchequer.²⁷ The defendants had contracted to assign to plaintiff their interest in an iron ore royalty; at the time of entering into the contract the defendants knew that consent of their lessors to the assignment to plaintiff would be necessary, but no mention of the necessity of such consent was made to the plaintiff. The defendants later fulfilled the conditions on which the lessors had originally been willing to consent to the assignment, but the lessors had meanwhile withdrawn their consent and, in spite of all efforts, defendants were unsuccessful. Plaintiff claimed for loss of bargain, thus bringing the case squarely within the rule of *Hopkins v. Grazebrook*.²⁸ But the Exchequer held plaintiff was not entitled to these damages and the decision was affirmed in the House of Lords.²⁹ The effect of the decision in *Bain v. Fothergill* was to overrule the limitation which *Hopkins v. Grazebrook*³⁰ had engrafted upon the rule of *Flureau v. Thornhill*,³¹ but the reasoning was inclined toward looseness.³² *Bain v. Fothergill*³³ was followed in *Gas Light & Coke Co. v. Towse*,³⁴ but the latter case is hardly authoritative

²⁵ *Potts v. Moran's Exec'rs*, *supra*, note 11; the language used is: "with the result that the cases of *Engel v. Fitch* . . . were disproved."

²⁶ See Lindley, M. R., in *Singleton v. Day* (1899), 2 Ch. 320, at p. 329; and Mew's Digest of English Case Law, Vol. 20, p. 1301.

²⁷ L. R. 6 Exch. 59.

²⁸ *Supra*, note 15.

²⁹ (1874) L. R. 7 H. L. 153, L. R. 7 Eng. & Ir. App. 153, 43 L. J. Ex. 243, 31 L. T. 387, 23 W. R. 261.

³⁰ *Supra*, note 15.

³¹ *Supra*, note 13.

³² "Assuming that the vendor acts bona fide, the difficulty must be equally known to the vendee as to the vendor." (Query, Why?) ". . . To enter into a contract for the purchase of land immediately to resell it, before the title is examined, is unusual and exceptional. It seems, therefore, more reasonable to treat the mere contract for the conveyance of land, not as based upon an implied warranty that the vendor has power to convey, but as involving the condition that the vendor has good title, and that if, on examination of the abstract, this turns out not to be so, the vendee cannot ask to be put in as good a position as if a conveyance with the usual covenants had been executed, but can only recover the expenses to which he has been put." (Italics ours.) But what is the effect of this distinction in a jurisdiction where, as in Kentucky, the damages for breach of the *executed agreement* are measured by the purchase price?

³³ *Supra*, notes 27 and 29.

³⁴ (1887) 35 Ch. Div. 519, at p. 542, 56 L. J. Ch. 889, 56 L. T. 602.

in that respect since it appeared that both parties knew of the existence of the defect.

At this point it would appear that *Flureau v. Thornhill*³⁵ had been vindicated, all exceptions laid to rest and the law clear for all future times. This tranquility was short-lived for *Day v. Singleton*³⁶ came up for decision in 1899. In the latter case, the defendant, who held a leasehold which he had no right to assign without license from his lessor, contracted to sell the interest to the plaintiff but, the defect becoming apparent, the defendant was unable to secure consent of the lessor to the assignment. The Court found that the vendor had failed to do his best to procure the license and gave full compensatory damages.³⁷ It suggests itself that the reason for this distinction lies less in a differentiation between "doing one's best," (*Bain v. Fothergill*),³⁸ and "not doing one's best," (*Day v. Singleton*),³⁹ and more in a deep-rooted objection to the unnatural results of the rule of *Flureau v. Thornhill*,⁴⁰ which it seems almost impossible for mere decisions to overcome.

*Day v. Singleton*⁴¹ took unique advantage of a subtle distinction introduced by Lord Hatherley in *Bain v. Fothergill*:⁴²

"The vendor in that case (*Engel v. Fitch*) was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. *Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance.*" (Italics ours.)

Was the defect then, in *Bain v. Fothergill*⁴³ a matter of title, and that of *Day v. Singleton*⁴⁴ a matter of conveyancing? Where can the line be drawn; and what rules shall govern the differentiation? Perhaps, as to England, the answer is laid down (almost with a smile?) in *Daniell v. Vassall*.⁴⁵ There a

³⁵ *Supra*, note 13.

³⁶ (1899) 2 Ch. 320, 68 L. J. Ch. 593, 81 L. T. 306, 48 W. R. 18.

³⁷ *Braybrooks v. Whaley* (1919), 1 K. B. 435, 88 L. J. K. B. 577; 120 L. T. 281, 63 S. J. 673, followed *Day v. Singleton* and distinguished *Bain v. Fothergill*.

³⁸ *Supra*, notes 27 and 29.

³⁹ *Supra*, note 36.

⁴⁰ *Supra*, note 13.

⁴¹ *Supra*, note 36.

⁴² *Supra*, note 29.

⁴³ *Supra*, notes 27 and 29.

⁴⁴ *Supra*, note 36.

⁴⁵ (1917) 2 Ch. 405, 87 L. J. Ch. 69, 117 L. T. 472, 61 S. J. 646, 33 T. L. R. 503.

testator had agreed to sell property which, with other property, was subject to one mortgage. After his death the title was accepted by the purchasers; but the mortgagees refused to release the property sold from their mortgage, and, *the estate being insolvent*, the executors of the vendor had not enough funds of the estate for redemption of the mortgage. Held, that the liability to the purchaser was not limited to the costs of investigating the title, but that plaintiff was entitled to general damages for loss of the bargain. In such case the absence of willful fraud and bad faith is immaterial. The Court stated:⁴⁶

"For as pointed out by Lindley, M. R., in *Day v. Singleton*, it (*Flureau v. Thornhill*) is an anomalous rule based upon and justified by difficulties in showing a good title to real property in this country. Now there is no special difficulty in obtaining a release of real estate that is in mortgage. *All that is required in general, and all that was requisite here, was to pay off the mortgage or a sufficient part of it to satisfy the mortgagees; and but for the lack of pecuniary means the testator and his estate were in a position to force the concurrence of the mortgagees.*⁴⁷ And this being so, a further remark of Lindley, M. R., in the same passage becomes apposite, namely, that the anomalous rule in question 'ought not to extend to cases in which the reasons on which it is based do not apply.'⁴⁸ (Italics ours.)

As these cases have indicated, one reason for the rule lay in the fact that in England a contract for the sale of real estate was closed almost directly. But in the United States, long-term options are given, as well as long-term executory contracts, so that while in England there was practically no fluctuation in the value of realty during the short time necessary for the closing of the contract, there may be considerable change in the value of the property under American practices.⁴⁹

It must be noted that it is proper, even in case of fraud by the vendor, to allow the innocent vendee to *rescind* and to recover payments made, expenses incurred and cost of improvements placed upon the property. This should be considered in the nature of *an election of remedies*.⁵⁰ Consequently a line

⁴⁶ (1917) 2 Ch., at p. 409.

⁴⁷ And in these modern times where "the husband's dominion over the wife is not what it once was, and the wife of today has asserted and established her independence . . . exercising her own judgment" (*Potts v. Moran's Exors*), would not the wife release her dower interest if the husband paid her sufficient consideration therefor?

⁴⁸ Compare *Morgan v. Russell* (1909), 1 K. B. 357, 78 L. J. K. B. 187, 100 L. T. 118, 25 T. L. R. 120, applying *Bain v. Fothergill*.

⁴⁹ *Ontario Asphalt Block Co. v. Montreuil* (1916), 52 Can. Sup. Ct. 541, 27 D. L. R. 514, Ann. Cas. 1917 B. 852.

⁵⁰ *Seaver v. Hall* (1897), 50 Nebr. 878, 70 N. W. 373; *aff'd* on rehearing, 52 Nebr. 316, 72 N. W. 217.

of Kentucky authorities in which the plaintiff framed his complaint upon the theory of rescission or cancellation, with claim for recovery of expenses and payments made, should not be considered as authoritative upon the right to recover damages for loss of bargain in either fraudulent or non-fraudulent breaches by the vendor.⁵¹

In addition to these cases which, by the nature of the pleadings, are not authoritative upon the issue in question, there have been a number of cases in which the Kentucky court (most frequently by dicta) has indicated favor toward the rule that, in the absence of fraud, the vendee cannot recover the full measure of damages. The reasons given by the Kentucky Court for following this rule fall roughly under four headings:

I. The case following by analogy the rule of damages in case of breach of executed contracts.

II. The cases following the lead of the English decisions.

III. The cases based on the condition of real estate titles.

IV. The cases following the rule of *stare decisis*.

I. A large number of those cases which are cited by the Court as authorities for the rule were decided on the question of damages for breach of warranty in the *executed contract*,⁵²

⁵¹ *Bullitt v. Eastern Kentucky Land Co.* (1896), 99 Ky. 324, 36 S. W. 16, 18 Ky. Law Rep. 230, rescission.

Shemwell v. Carper's Adm'rs (1905), 27 Ky. Law Rep. 997, 87 S. W. 771, encumbrance—cancellation and refund.

Gayle v. Troutman (1907), 31 Ky. Law Rep. 718, 103 S. W. 342, refusal to convey—rescission and refund.

Elliott v. Walker (1911), 145 Ky. 71, 140 S. W. 51, rescission and lien for price paid.

Moreland v. Henry (1914), 156 Ky. 712, 161 S. W. 1105, deficit in acreage.

Mann v. Campbell (1923), 198 Ky. 812, 250 S. W. 110, encumbrance—cancellation and refund.

⁵² *Allen v. Anderson* (1811), 2 Bibb (5 Ky.) 415.

Cox's Heirs v. Strobe (1811), 2 Bibb (5 Ky.) 273, 5 Am. Dec. 603.

Booker's Adm'r v. Bell's Ex'rs (1813), 3 Bibb (6 Ky.) 173, 6 Am. Dec. 641.

Kelly's Heirs v. Bradford (1814), 3 Bibb (6 Ky.) 317, 6 Am. Dec. 656.

Rankin v. Maxwell's Heirs (1820), 2 A. K. Marsh. (9 Ky.) 488, 12 Am. Dec. 431, bill for specific performance, it appearing that defect in title applied to only part of the land; the case is not authoritative since there was no proof of actual value of the land at time of breach of the agreement to convey.

Triplett v. Gill (1832), 7 J. J. Marsh. (30 Ky.) 438.

Combs v. Tarleton's Adm'rs (1834), 2 Dana (32 Ky.) 464.

Hunt v. Orwig (1856), 17 B. Mon. (56 Ky.) 73, 66 Am. Dec. 144.

Robertson v. Lemon (1867), 2 Bush (65 Ky.) 301.

Sullivan v. Hill (1908), 33 Ky. Law Rep. 962, 112 S. W. 564.

Helton v. Asher (1909), 135 Ky. 751, 123 S. W. 285.

which is determined by the purchase price and reasonable expenditures, and are only analagous due to the declarations of the Court that "with respect to the measure of damages, there was no substantial difference between a breach of warranty of title, and the breach of a covenant to convey where the vendor acted in good faith."⁵³

It will be noticed, however, that the English cases cited *ante* (upon which the Kentucky rule is based), were cases where *the situation did not involve breach of warranty* and in which the question was: "Shall full compensatory damages be awarded on breach of the executory contract?" and not: "What damages shall be awarded for breach of covenant of warranty?" Clearly the English Courts have recognized that the rules are not necessarily analagous as to the measure of damages. It is submitted that these cases also⁵⁴ are not authoritative on the measure of damages.

II. There are really very few cases in which the Kentucky Court has expressly recognized the "English rule." *Allen v. Anderson*⁵⁵ cites *Flureau v. Thornhill*,⁵⁶ but as pointed out *ante*⁵⁷ that case involved breach of warranty, nor does the decision contain any discussion of the principle involved. *Herndon v. Venable*⁵⁸ was a square decision but cites no authority other than *Combs v. Tarleton*⁵⁹ and *Triplett v. Gill*⁶⁰ which also were cases on warranties; nor does the Court discuss the principles of the rule in question. *Wilson v. Hendrix*⁶¹ appears only as an unreported decision. *Slusher v. Moore*⁶² contains a dictum, the case involving a suit for broker's commission. The decision in *Jenkins v. Hamilton*⁶³ was clearly contra to the "English rule", and must impliedly have overruled *Herndon v. Venable*,⁶⁴ but, as pointed out, the Jenkins case was expressly overruled as to the rule of damages.⁶⁵ The only cases which appear,

⁵³ E. g., *Potts v. Moran's Exec'rs*, *supra*, note 11.

⁵⁴ *Supra*, note 52.

⁵⁵ *Supra*, note 52.

⁵⁶ *Supra*, note 13.

⁵⁷ *Supra*, note 52.

⁵⁸ (1838) 7 Dana (37 Ky.) 371.

⁵⁹ *Supra*, note 52.

⁶⁰ *Supra*, note 52.

⁶¹ *Supra*, note 3.

⁶² (1924) 202 Ky. 13, 258 S. W. 946.

⁶³ *Supra*, note 7.

⁶⁴ *Supra*, note 58.

⁶⁵ *Supra*, note 8.

after diligent search, to discuss the origin and authority of the rule as based upon *Flureau v. Thornhill*⁶⁶ are *Crenshaw v. Williams*⁶⁷ in 1921, and *Potts v. Moran's Exec'rs.*⁶⁸ in 1930.

III. Apparently the only case in Kentucky indicating a possible basis for the rule upon the condition of real estate titles is that of *Crenshaw v. Williams*,⁶⁹ in which the Court stated:

"The English Courts put the distinction upon the ground of the intricate involvement of titles to real estate growing out of the variously worded deeds, wills and other muniments of title, so that a vendor might innocently believe that he could convey a good title when a learned attorney or a court might determine otherwise. Another reason suggesting itself to us is that real property is the only character of property absolutely essential to human existence,⁷⁰ and that it is the policy of the law for it to remain in the hands of homebuilders and homemaintainers,⁷¹ and not to encourage speculative or chance bargaining in it, but to adjust the rights of the parties concerning the transfer, in the absence of fraud or bad faith, by placing them in statu quo, which, in the absence of a contrary showing will be presumed to have been in their contemplation."⁷²

Even though it be granted that the doctrine was not entirely illogical when applied to the actual conditions surrounding the execution of these contracts when the "exceptional and anomalous rule" was first enunciated in England due to the fact that the executory status of the contract was intended to be, and usually was, of short duration, it nevertheless appears that in practically all American jurisdictions the character and purpose of executory contracts have so changed as to make this rule of damages inapplicable, especially since the executory character of the agreement frequently extends over a period of years, during which time the vendee has made substantial payments upon the principal, and substantial improvements upon the property, with the result that the value of the property

⁶⁶ *Supra*, note 13.

⁶⁷ *Supra*, note 8.

⁶⁸ *Supra*, note 11; and neither of these cases note the interesting development in the English law since *Bain v. Fothergill* in 1876.

⁶⁹ *Supra*, note 8.

⁷⁰ This "reason" seems to have the uniqueness of novelty.

⁷¹ But if the homebuilders and homemaintainers purchase on long-term contracts and, defects appearing at the close thereof, whereby their interest is rendered worthless are compelled to be content with the return of their payments with interest (even assuming that such a judgment is collectable), it would seem that they would have neither that particular home nor another home which they might have secured with the same money *before land values advanced*, and therefore the policy of the law is defeated.

⁷² While this is an orthodox argument of the English Courts, query, if this really is the intent of the *purchaser*.

is greatly increased, exceeding the price paid plus cost of improvements with interest. Also modern practices of conveyancing, and statutes regulating recordation have tended, if not been designed, to increase and facilitate rapid trading in titles. There is no longer a good reason why one who undertakes to sell a particular interest may not be required to abide by the terms of his contracts especially since, if there is any doubt in his mind, the vendor may protect himself by the insertion of express provisions against contingencies or for liquidated damages.⁷³

IV. *Crenshaw v. Williams*⁷⁴ also introduced a new reason for the rule which seems not to have been clearly stated theretofore by the Kentucky Court. It is the rule of stare decisis:

"It has been wisely said, in substance, that it is not so material as to what the law is as that it be certain. It is, of course, the intent of the law and the desire of the courts that abstract justice should prevail in every case, and that judicial declarations should harmonize with logic and reason as inspirations for them; but in the multiplicity of complicated facts found in almost every case, which control its final destiny, such a coveted result cannot always be obtained by fallible humanity. There can be, however, in the same jurisdiction, approximate certainty as to the law applicable to the same state of facts, and courts of last resort should strive for the summation of that end. Thus guided, and remembering the stare decisis doctrine, we are constrained to hold that the doctrine of the cases hereinbefore referred to (except the *Jenkins* case) is the one which we should adopt in this case."

As has been pointed out, it is the opinion of the writer that the decisions in Kentucky have by no means been as *authoritative* upon this proposition as this quotation indicates. Nor has the proposition been without some digression and dissent in Kentucky,⁷⁵ particularly *Jenkins v. Hamilton*, quoted *ante*.⁷⁶

See also *Grant v. McArthur's Exec'r*⁷⁷ in which vendors had contracted to deliver a fee title by a certain date and then discovered that they held only a life estate; expenditures were then made to clear the title and plaintiff sought to charge these

⁷³ *Hartzell v. Crumb* (1886), 90 Mo. 629, 3 S. W. 59.

⁷⁴ *Supra*, note 8.

⁷⁵ *Allison v. Cocke's Exec'rs* (1901), 112 Ky. 212, 65 S. W. 342, 66 S. W. 392, 23 Ky. Law Rep. 1599.

Whitworth v. Pool (1906), 29 Ky. Law Rep. 1104, 96 S. W. 880.

⁷⁶ *Supra*, note 7.

⁷⁷ (1913) 155 Ky. 356, 155 S. W. 732.

expenditures upon a partnership settlement between the vendors. This the Court allowed.⁷⁸

Nor have the possible reasons for adhering to the rule of *Flureau v. Thornhill*⁷⁹ passed without vigorous criticism from some of those jurisdictions which follow the contrary rule. The *consideration* of the contract is never the rule of estimating the damages for breach of an express agreement.⁸⁰ And why should *good faith* of the vendor diminish the actual damages which the vendee has sustained by reason of the breach of the contract?⁸¹ The basing of compensatory damages solely upon the existence of fraud (actual or implied from the circumstances) practically amounts to allowing full recovery in an action *ex contractu* only upon the existence of a cause of action *ex delicto*. And while Professor Ames pointed out that the action of special assumpsit developed from the tort action of deceit,⁸² liability for breach of contract no longer depends on a tortious misfeasance or nonfeasance. Even the English cases have declared the rule anomalous,⁸³ and that the rule should not be extended beyond the situations for which it was designed.⁸⁴ Motives, good faith or fraud in the mind of the vendor are difficult things to prove and the rule encourages loose contractual dealings; the "English rule" furnishes an incentive to perjury and falsification, since the vendor is strongly tempted to avoid his agreement where there has been a rise in the value of the property.⁸⁵ The English rule "is not easily applied in all cases, and the books are burdened with discussions and restrictions and qualifications which, in different jurisdictions are annexed to it."⁸⁶

⁷⁸ Stating: "On the other hand they (the vendors), had not executed a deed to Messrs. Flynn and Simmons, but were under obligation to do so and to convey a good title by a certain time. If therefore they failed to do so by the time stipulated in the contract, they were liable in damages for such failure."

⁷⁹ *Supra*, note 13.

⁸⁰ *Wells v. Abernathy* (1828), 5 Conn. 222.

⁸¹ *Tracy v. Gunn* (1883), 29 Kan. 508.

⁸² "History of Assumpsit," 2 Harv. Law Rev. 1; Ames: Lectures on Legal History, 129; Selected Essays on Anglo American Legal History, Vol. 3, p. 259; Selected Readings on the Law of Contracts, 33.

⁸³ E. g., *Sikes v. Wild*, *supra*, note 21; *Engel v. Fitch*, *supra*, note 22; *Day v. Singleton*, *supra*, note 36; *Daniell v. Vassall*, *supra*, note 45.

⁸⁴ E. g., *Sikes v. Wild*, *supra*, note 21; *Engel v. Fitch*, *supra*, note 22; *Day v. Singleton*, *supra*, note 36; *Daniell v. Vassall*, *supra*, note 45.

⁸⁵ *Doherty v. Dolan* (1876), 65 Me. 87, 20 Am. Rep. 677.

⁸⁶ *Idem.*, 20 Am. Rep., at p. 680.

It is an interesting coincidence that the rule has not been extended to the executory contract for the sale of chattels⁸⁷ and, as the Kentucky Court has stated,⁸⁸ "If it should be asked why there should be a different rule governing the measurement of damages for failure to comply with a contract relating to real estate, than the one of personalty, we might find it difficult to give a satisfactory answer."

It is also notable that while Kentucky holds that, where the defect consists of a refusal of a spouse to release dower, plaintiff cannot recover for loss of the bargain, some other jurisdictions have held opposite and allowed recovery of full damages under those circumstances.⁸⁹

The "English rule" has been applied also in California,⁹⁰ Indiana,⁹¹ Iowa,⁹² Louisiana,⁹³ Maryland,⁹⁴ Michigan,⁹⁵ Montana,⁹⁶ New Jersey,⁹⁷ Pennsylvania,⁹⁸ South Dakota,⁹⁹ Texas,¹⁰⁰ Virginia,¹⁰¹ Washington,¹⁰² West Virginia,¹⁰³ Wisconsin¹⁰⁴ and Canada.¹⁰⁵

⁸⁷ *Kitchen v. Wilcox* (1900), 21 Ky. Law Rep. 1823, 56 S. W. 514.

⁸⁸ *Crenshaw v. Williams*, *supra*, note 8.

⁸⁹ *Greenberg v. Ray* (1926), 214 Ala. 481, 108 So. 385.

Key v. Alexander (1926), 91 Fla. 975, 108 So. 883.

Puterbaugh v. Puterbaugh (1893), 7 Ind. App. 280, 33 N. E. 308, 34 N. E. 611.

McAdam v. Leak (1922), 111 Kan. 704, 208 Pac. 569.

Grosso v. Sporer (1924), 123 Mis. Rep. 796, 206 N. Y. S. 227.

McCarty v. Lingham (1924), 111 Oh. St. 551, 146 N. E. 64.

Greer v. Doriot (1923), 137 Va. 589, 120 S. E. 291.

Stone v. Kaufman (1921), 83 W. Va. 538, 107 S. E. 295.

⁹⁰ *Yates v. James* (1891), 89 Cal. 474, 26 Pac. 1073.

⁹¹ *Blackwell v. Board of Justices* (1828), 2 Blackf. 143; but cf. *Puterbaugh v. Puterbaugh*, *supra*, note 89.

⁹² *White v. Harvey* (1916), 175 Ia. 213, 157 N. W. 152.

⁹³ *Baton Rouge Realty Co. v. Bailey* (1925), 157 La. 838, 103 So. 184.

⁹⁴ *Horner v. Beasley* (1907), 105 Md. 193, 65 Atl. 820.

⁹⁵ *Bartlett v. Smith* (1906), 146 Mich. 188, 117 Am. Rep. 625, 109 N. W. 260.

⁹⁶ *Ross v. Saylor* (1909), 39 Mont. 559, 104 Pac. 864.

⁹⁷ *Gerbert v. Sons of Abraham* (1896), 59 N. J. L. 160, 69 L. R. A. 764, 59 Am. St. Rep. 573, 35 Atl. 1121.

⁹⁸ *Orr v. Greiner* (1916), 254 Pa. 308, 98 Atl. 951.

⁹⁹ *Dal v. Fischer* (1906), 20 S. D. 426, 107 N. W. 534.

¹⁰⁰ *Kelly v. Simon* (1924), 262 S. W. 202.

¹⁰¹ *Greer v. Doriot*, *supra*, note 89.

¹⁰² *Crawford v. Smith* (1923), 127 Wash. 77, 219 Pac. 855.

¹⁰³ *Mooring v. Warnock* (1924), 95 W. Va. 539, 121 S. E. 732; but cf. *Stone v. Kaufman*, *supra*, note 89.

¹⁰⁴ *McFarlane v. Dixon* (1922), 176 Wis. 652, 187 N. W. 671, 48 A. L. R. 1.

¹⁰⁵ *Ontario Asphalt Block Co. v. Montreuil*, *supra*, note 49.

But it has been denied application in Alabama,¹⁰⁶ Arkansas,¹⁰⁷ Florida,¹⁰⁸ Georgia,¹⁰⁹ Illinois,¹¹⁰ Kansas,¹¹¹ Maine,¹¹² Massachusetts,¹¹³ Minnesota,¹¹⁴ Missouri,¹¹⁵ Nebraska,¹¹⁶ New Hampshire,¹¹⁷ New York,¹¹⁸ North Carolina,¹¹⁹ North Dakota,¹²⁰ Ohio,¹²¹ Utah,¹²² Wyoming¹²³ and the United States Supreme Court.¹²⁴

CONCLUSION.

It is submitted in conclusion that while a number of the early Kentucky cases indicated adherence to that which we now denominate the "English rule" of damages, that those remarks were dicta, due to the fact that the question therein was not squarely presented and the actual decisions are upon other propositions; that those decisions do not reveal any investigation of the English law at the time those cases were decided. That the situations in which the rule was first evolved, and adherence placed thereon, in England were strictly cases of breach of the *executory contract*, while the rule in Kentucky is based, as far as precedent is concerned, upon the analogy of the rule of damages for breach of the *executed contract* upon the assumption that the rule of damages is and should be the same in both types of case.¹²⁵ It is also submitted that *Jenkins v. Hamilton*¹²⁶ was

¹⁰⁶ *Greenberg v. Ray*, *supra*, note 89.

¹⁰⁷ *McGregor v. Echols* (1927), 153 Ark. 123, 239 S. W. 736.

¹⁰⁸ *Key v. Alexander*, *supra*, note 89.

¹⁰⁹ *Mitchell v. Owen* (1924), 31 Ga. App. 649, 121 S. E. 699, rev. 159 Ga. 690, 127 S. E. 122; (1925) 33 Ga. App. 665, 128 S. E. 12.

¹¹⁰ *Dady v. Condit* (1904), 209 Ill. 488, 70 N. E. 1088.

¹¹¹ *McAdam v. Leek*, *supra*, note 89.

¹¹² *Doherty v. Dolan*, *supra*, note 85.

¹¹³ *Boydén v. Hill* (1908), 198 Mass. 477, 85 N. E. 413.

¹¹⁴ *Vallentyne v. Immigration Land Co.* (1905), 95 Minn. 195, 103 N. W. 1028, 5 Ann. Cas. 212.

¹¹⁵ *Kirkpatrick v. Downing* (1874), 58 Mo. 32, 17 Am. Rep. 678.

¹¹⁶ *Beck v. Staats* (1908), 80 Nebr. 482, 114 N. W. 633, 16 L. R. A. N. S. 768.

¹¹⁷ *Chartier v. Marshall* (1876), 56 N. H. 478.

¹¹⁸ *Grosso v. Sporer*, *supra*, note 89.

¹¹⁹ *Howell v. Pate* (1921), 181 N. C. 117, 106 S. E. 454.

¹²⁰ *Merritt v. Adams County Land Co.* (1915), 29 N. D. 496, 151 N. W. 11.

¹²¹ *McCarty v. Lingham*, *supra*, note 89.

¹²² *Dunshee v. Goeghegan* (1891), 7 Utah 113, 25 Pac. 731.

¹²³ *Francis v. Brown* (1915), 22 Wyo. 528, 145 Pac. 750.

¹²⁴ *Hopkins v. Lee* (1821), 6 Wheat. 109, 5 L. Ed. 218.

¹²⁵ Is it possible that criticism might also be made of the rule of damages for breach of *warranty*?

¹²⁶ *Supra*, note 7.

authoritative in Kentucky upon the law in question, and that the Court, in *Crenshaw v. Williams*,¹²⁷ was in error in believing that *Jenkins v. Hamilton* was an isolated case in conflict with a settled general rule. It is the opinion of the writer that the decisions of *Crenshaw v. Williams* and *Potts v. Moran's Exec'rs*¹²⁸ are out of harmony with the later development of the law in England, particularly in respect to the rules of *Day v. Singleton*¹²⁹ and *Daniell v. Vassall*¹³⁰ which indicate a definite trend away from the limitations of *Bain v. Fothergill*¹³¹ upon which the Kentucky Court has placed reliance;¹³² and that the objections to the "English rule" seem so weighty as a matter of logic, and so desirable as a matter of public policy for those ends which the law desires to protect, as to commend further consideration by the Court. The American jurisdictions adhering to the "English rule" and those disagreeing with it are so closely balanced that it is impossible to affirm that Kentucky is actually within the majority rule.

It is respectfully submitted that upon a reconsideration of this problem in the next presented case that the Court of Appeals would be within the principles of stare decisis in overruling *Crenshaw v. Williams*¹³³ and *Potts v. Moran's Exec'rs*,¹³⁴ (since courts do occasionally overrule an erroneously decided case), and in returning to the correct rule of *Jenkins v. Hamilton*,¹³⁵ taking cognizance of the fact, under the present development of our systems of conveyancing and recordation, that land titles are not in a chaotic state. It is believed that by definitely readopting this rule the court would achieve those results of tending toward uniformity of the law in this jurisdiction, of having abstract justice prevail, of harmonizing judicial declarations with logic and reason and as inspirations for them, of protecting homebuilders and homemaintainers, of discouraging speculative and chance bargaining in realty, of discouraging perjury and of fairly adjusting the rights of both parties to the

¹²⁷ *Supra*, note 8.

¹²⁸ *Supra*, notes 8 and 11 respectively.

¹²⁹ *Supra*, note 36.

¹³⁰ *Supra*, note 45.

¹³¹ *Supra*, notes 27 and 29.

¹³² E. g., *Potts v. Moran's Exec'rs*, *supra*, note 11.

¹³³ *Supra*, note 8.

¹³⁴ *Supra*, note 11.

¹³⁵ *Supra*, note 7.

transfer,—which it has in *Crenshaw v. Williams*¹³⁶ declared to be the aim of the Kentucky Court of Appeals.

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¹³⁶ *Supra*, note 8.

KENTUCKY LAW JOURNAL

Volume XX

March, 1932

Number 3

Published four times a year by the College of Law, University of Kentucky: Issued in November, January, March, and May.

Subscription Price \$2.50 Per Year.....75c Per Number

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